S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

KYLE BUKOWSKI,

Plaintiff-Appellant,

v

CRAIG KENDALL and BARBARA ANN KENDALL,

Defendants-Appellees.

UNPUBLISHED
March 10, 2005

No. 251420
Livingston Circuit Court
LC No. 02-019606-NI

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10). The trial court ruled that defendants did not owe plaintiff a duty because the alleged dangerous condition posed an objectively open and obvious danger as a matter of law. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition because there was a genuine issue of material fact as to whether mud under the puddle of water at issue was open and obvious. We review a grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing such a decision under MCR 2.116(C)(10), we review all pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the non-moving party to determine whether there is any genuine issue of material fact that would entitle the non-moving party to judgment as a matter of law. *Id.* at 357-358.

It is undisputed for purposes of this appeal that plaintiff was an invitee. Thus, defendants had a duty to plaintiff to maintain the premises in a reasonably safe condition and to warn him of any unreasonable risk of harm that they knew about or should have known about and that a reasonable person might not discover upon casual inspection. *Novotney* v *Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Generally, landowners owe invitees no duty to warn them of, or to protect them from, an open and obvious danger. *Lugo v*

Ameritech Corp, Inc, 464 Mich 512, 517; 629 NW2d 384 (2001).[1] To determine whether a danger is open and obvious, courts ask whether a reasonable person would objectively anticipate the danger or whether a reasonable person could discover the dangerous condition by making a casual inspection. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105-106; 689 NW2d 737 (2004).

We conclude that a reasonable person would expect that a puddle of water, such as the one at issue, could be slippery, regardless of whether it was muddy, and would guard against the danger of slipping and falling. Further, because it had been raining for several days and the driveway was located directly adjacent to a dirt road, a reasonable person would expect that the puddle could be muddy. In this regard, we note that in *Lugo*, *supra* at 517-519, our Supreme Court referred to standing water as an open and obvious danger without further explaining why standing water would present an open and obvious danger. This reflects that a puddle of water presents such an obvious particularized risk of slipping and falling that the *Lugo* Court considered it unnecessary to further discuss the point. Thus, we conclude that the puddle at issue constituted an open and obvious danger even if it contained mud that was not immediately visually apparent in itself.

However, summary disposition was also proper because a reasonable person could have noticed the mud on casual inspection. Since a reasonable person would be on notice that a puddle could be slippery, a reasonable person would guard against the risk by, at the very least, looking down into a puddle before stepping into it. When asked if he could see the mud or slime at the bottom of the puddle, plaintiff's eyewitness, the driver of the vehicle, testified that he could see marks in the slime from where plaintiff had slipped. Notably, the driver mentioned that he did not need to help plaintiff up, nor did the driver enter the puddle, and therefore must have observed the mud from outside the puddle. Although plaintiff's accident investigator opined that the mud "was not visually apparent" nothing in his affidavit suggests that he actually saw the mud or the puddle. Thus, this conclusory opinion is insufficient to create a genuine issue of material fact. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002). Therefore, the trial court properly granted summary disposition to defendants under MCR 2.116(C)(10).

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[1] We note that plaintiff has not argued that there is evidence of "special aspects" that might make the condition at issue unreasonably dangerous even if it was open and obvious. See *Lugo, supra* at 517-519.